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Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALI SALEH KAHLAH AL-MARRI,

Petitioner,

v.

DANIEL SPAGONE,
UNITED STATES NAVAL COMMANDER,
CONSOLIDATED NAVAL BRIG,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF AMICI CURIAE MUSLIM ADVOCATES, THE SIKH COALITION, AMERICAN-ARAB ANTI-DISCRIMINATION COMMITTEE, JAPANESE AMERICAN CITIZENS LEAGUE, AND SOUTH ASIAN AMERICANS LEADING TOGETHER IN SUPPORT OF PETITIONER

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Addington v. Texas,
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Carlson v. Landon,
342 U.S. 524 (1952) 8

Duncan v. Louisiana,
391 U.S. 145 (1968) 5

Ex Parte Tom Tong,
108 U.S. 556 (1883) 7

Hamdi v. Rumsfeld,
542 U.S. 507 (2004) 6, 7, 30

Hirabayashi v. United States,
320 U.S. 81 (1943) 30

Korematsu v. United States,
323 U.S. 214 (1944) 25

O'Connor v. Donaldson,
422 U.S. 563 (1975) 8

People's Union for Civil Liberties v. Union of India,
AIR 2004 SC 456 35

Pointer v. Texas, 380 U.S. 400 (1965).....5

Rodman v. Pothier, 264 U.S. 399 (1924) 7

Schall v. Martin, 467 U.S. 253 (1984).....7

Stenberg v. Carhart, 530 U.S. 914 (2000) 30

United States v. Gaudin,
515 U.S. 506 (1995) 5–6

United States v. Marion,
404 U.S. 307 (1971) 5

United States v. Salerno,
481 U.S. 739 (1987) 7

Whitney v. California,
274 U.S. 357 (1927) 35

UNITED STATES CONSTITUTION, STATUTES, EXECUTIVE ORDERS AND RULES

March 21, 1942 Act of Congress, 56 Stat. 173 30

Authorization for Use of Military Force,
Pub. L. No. 107-40, 115 Stat. 224 (2001)..... 2

Emergency Detention Act of 1950, 18 U.S.C. § 4001(a) 30

Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942) 30

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

INTERNATIONAL CONSTITUTION, STATUTES AND EXECUTIVE ORDERS

Civil Authority (Special Powers) Act, 1922, 12 Geo. 5, c. 5, sched., reg. 23 9–10

Detention of Terrorists (Northern Ireland) Order, 1972, S.I. 1632 (N.I. 15) 10

EMPRR No. 17, Gazette No. 563/7 (June 20, 1989) 17

EMPRR No. 19, Gazette No. 1405/14 (Aug. 13, 2005) 17–18

India Const., Sched. 7, List I, Entry 9 13–14

India Const., Sched. 7, List III, Entry 3 13–14

Northern Ireland (Emergency Provisions) Act, 1973, c. 53. 10

Public Security Ordinance, No. 25 of 1947 16

Prevention of Terrorism Act, No. 15 of 2002..... 14

Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979..... 16, 17, 18

Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985..... 14

Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987..... 14

Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008..... 23

OTHER

Am. Civil Liberties Union, Sanctioned Bias: Racial Profiling Since 9/11 (Feb. 2004)..... 28

Amita Shastri, *Government Policy and the Ethnic Crisis in Sri Lanka, in* Government Policies and Ethnic Relations in Asia and the Pacific 129 (Michael E. Brown & Sumit Ganguly eds., 1997)..... 24

Amnesty Int'l, A Report on Allegations of Ill-Treatment Made by Persons Arrested Under the Special Powers Act After 8 August, 1971 (1971)..... 12

Amnesty Int'l, India: New Anti-Terror Laws Would Violate International Human Rights Standards (Dec. 18, 2008) 24

Amnesty Int'l, India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003) 15

Amnesty Int'l, Sri Lanka, New Emergency Regulations – Erosion of Human Rights Protections (July 1, 2000) 18–19

Amnesty Int'l, Sri Lanka: Silencing Dissent (Feb. 7, 2008). 18

Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 Colum. J. Asian L. 93 (2006) 13–16, 23, 33

Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 Denv. J. Int'l L. & Pol'y 285 (2005) 13

Bill Dedham, *Memo Warns Against Use of Profiling as Defense*, Boston Globe, Oct. 12, 2001 28–29

Brendan O'Duffy, *Radical Atmosphere: Explaining Jihadist Radicalization in the UK*, 41 Pol. Sci. & Politics 137 (2008) 34–35

Brendan O'Duffy & Brendan O'Leary, *Violence in Northern Ireland, 1969-June 1989, in* The Future of Northern Ireland (John McGarry & Brendan O'Leary eds., 1990) 22

Chris Gagne, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 B.C. Third World L.J. 261 (2005) 16

Clark Kent Ervin, *The Usual Suspects*, N.Y. Times, June 27, 2006 ..... 27, 28, 35

Comm'n On Wartime Relocation And Internment Of Civilians, Report: Personal Justice Denied (1983) 29, 30

Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principal of Non-Discrimination*, 31 Brook. J. Int'l L. 495 (2006) 9

David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 Utah L. Rev. 913 (2004) 28, 34

David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953 (2002). 33, 36

David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 Hum. Rights 261 (1976) 10–13, 21, 22

Deborah N. Pearlstein, *National Intelligence and the Rule of Law*, 2 Advance 11 (Fall 2008) 36

Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 Temp. Pol. & Civ. Rts. L. Rev. 495 (2005) 34

Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 Harv. Hum. Rts. J. 269 (1998) 17–19

Fed. Bureau of Investigation, Countering Terrorism: Integration of Practice and Theory (Feb. 28, 2002) 29

H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435 31

Hearing before S. Select Comm. on Intelligence, 111th Cong. 7 (Jan. 22, 2009) 35

Human Rights Watch, In the Name of Counter-Terrorism: Human Rights Abuses Worldwide (Mar. 25, 2003) 15–16, 16

Human Rights Watch, World Report 2009 – Sri Lanka (Jan. 14, 2009) 17, 19

Indian President Approves Anti-Terror Law, CBS News, Jan. 2, 2009 14

Justice for All – A Nationwide Public Forum on Selective Enforcement After September 11, 2001 Before Sens. Edward M. Kennedy and Patty Murray (June 4, 2003) 27

Laura K. Donohue, Counter-terrorist Law and Emergency Powers in the United Kingdom 1922–2000 (2001) 10, 12, 13, 21

Lawyers Comm. For Human Rights, Assessing the New Normal, Liberty and Security for the Post-September 11 United States (2003) 34, 36

Manas Mohapatra, Comment, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. Crim. L. & Criminology 315 (2004) 14–16, 23

Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes made Fighting Terrorism in Northern Ireland*, 24 Cardozo L. Rev. 1657 (2003) 11, 12, 20, 21

N. Monaharan, East-West Center, Counterterrorism in Sri Lanka: Evaluating Efficacy (2006) 18

Nagendar Sharma, *Won't Allow Misuse of Terror Law: PC*, Hindustan Times, Dec. 19, 2008 ..... 23, 35

Nicole J. Henderson et al., Vera Inst. Of Justice, Law Enforcement & Arab Community Relations After September 11, 2001: Engagement in a Time of Uncertainty (2006) 32

Office of Inspector General, Dep't of Justice, The September 11th Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of September 11 Attacks (April 2003) 26, 27

Peter DiDomenica Discusses Counterterrorism Measures, Nat'l Pub. Radio, July 30, 2005 28

Philip A. Thomas, *September 11th and Good Governance*, 53 N. Ireland Legal Q. 366 (2002) 21, 22

Police Executive Research Forum, 2 Protecting Your Community From Terrorism: Strategies for Local Law Enforcement: Working with Diverse Communities (2004) 32

Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland (1972) 11

R. J. Spjut, *Internment and Detention Without Trial in Northern Ireland 1971–1975: Ministerial Policy and Practice*, 49 Mod. L. Rev. 712 (1986) 9, 11, 12, 22

Radhika Coomaraswamy et al., *Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*, 2 Int'l J. Const. L. 272 (2004) 17, 18, 24

Rama Lakshmi, *Anti-Terror Bills Advance in India*, Wash. Post, Dec. 18, 2008, at A21 ..... 14, 24

Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland (1975) 21

The Federalist No. 84 (Alexander Hamilton) 6–7

Threat of Islamic Radicalization to the Homeland: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs, 110th Cong. 3 (March 14, 2007) 32–33

U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2005 (Mar. 8, 2006). 25

U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2007 (Mar. 11, 2008) 19

Vincent Cannistraro, *The War on Terror Enters Phase 2*, N.Y. Times, May 2, 2002 ..... 34, 36–37

INTEREST OF THE *AMICI CURIAE*[1]

Amici are five civil rights, not-for-profit organizations firmly committed to the principle that this Country's freedoms must be afforded equally to every person in the United States of America.[2] Their interest in this case arises from the extraordinary detention power being asserted by the government. A decision by this Court upholding that power, *amici* submit, would pose an unwarranted threat to the civil liberties of citizens and lawful residents and

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[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission. The parties have consented to the filing of this brief. Sup. Ct. R. 37.3(a).

[2] Specifically, Muslim Advocates is a national legal advocacy and educational entity dedicated to protecting freedom, justice and equality for all, regardless of faith, and to promoting the full participation of Muslims in American civic life. The Sikh Coalition is a community-based organization that works towards the realization of civil and human rights for all people. The American-Arab Anti-Discrimination Committee is a civil rights organization committed to defending the rights of people of Arab descent and promoting their rich cultural heritage. Japanese American Citizens League, founded in 1929, is the nation's oldest and largest Asian American non-profit, non-partisan organization committed to upholding the civil rights of Americans of Japanese ancestry and others. South Asian Americans Leading Together is a national organization dedicated to fostering civic and political engagement by South Asians in the United States through a social justice framework that includes policy analysis and advocacy, community education, and leadership development.

visitors alike, one which history shows would leave minority and immigrant communities particularly vulnerable.

INTRODUCTION AND SUMMARY OF ARGUMENT

Petitioner Ali Saleh Kahlah al-Marri, a national of Qatar, was arrested while lawfully present in the United States in December 2001 and later indicted on a number of federal criminal charges. A month before his criminal trial was scheduled to begin, the President declared al-Marri an "enemy combatant," the criminal charges against him were dismissed, and al-Marri was placed in military detention, where he has remained, uncharged and untried with respect to any crime, since June 2003.

Al-Marri challenges the government's claim that it can subject him to indefinite military detention without charge or trial. The government, in contrast, maintains that al-Marri is an "enemy combatant" and that, consistent with the Constitution, the Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001), ("AUMF")[3] authorizes al-Marri's detention based on

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[3] The AUMF permits the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001 . . . in order to prevent any future acts of international terrorism against the United States by such nations, organizations or persons." § 2(a), 115 Stat. 224.

the government's assertions that he is associated with al Qaeda and engaged or intends to engage in terrorist activities.

Although Petitioner currently is the only alleged "enemy combatant" detained on U.S. soil by the government under the claimed authority of the AUMF, the power asserted by the Executive and upheld by a majority of the Court of Appeals for the Fourth Circuit[4] knows no limiting principle. If sanctioned by this Court, that power could be used far more broadly as a means to hold indefinitely anyone whom the Executive suspects of having some connection to terrorism—including in cases where the asserted connection is much less substantial than what is publicly known about the accusations against al-Marri—without affording the detainee the protections provided by our criminal justice system, indeed without ever charging the detainee with any crime at all.

Amici are deeply concerned by the threat to civil liberty posed by this asserted power—and with reason. History offers examples of other societies that have responded to terrorist threats by establishing regimes of detention without trial analogous to the authority the government claims to possess under the AUMF. Much as the Founding Fathers perceived from their own experience with the English Crown, the lesson of this more recent experience teaches again that legal systems that

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[4] *Al-Marri v. Pucciarelli*, 534 F.3d 213, 216 (4th Cir. 2008) (en banc) (per curiam). A different majority of the court ruled that al-Marri had not been given sufficient process to challenge the President's enemy combatant determination. *Id.*

permit detention without charge or trial impose great costs on liberty: they result in the widespread detention of innocent people; they tend to be applied discriminatorily against racial, ethnic, religious or ideological groups; and they are closely associated with other abuses, such as the physical mistreatment and torture of detainees. There is no evidence, moreover, that such detention regimes are particularly effective, let alone successful, in combating or reducing terrorism, whereas there is solid ground to believe that they are counterproductive.

These lessons are not confined to examples from abroad; on occasion, when threatened by war or terrorist attack, this Nation, too, has put aside the individualized process that is the hallmark of our criminal procedure in favor of sweeping detention programs. The result, again, was to detain large numbers of innocent citizens and lawful residents; acute discrimination in the programs' application; and no discernible benefit to the Nation's security.

This historical record is directly relevant to the question of statutory interpretation now before this Court. It would be implausible and inappropriate to conclude that Congress silently authorized a system of domestic preventive detention without even pausing to consider or debate the serious abuses such systems repeatedly have entailed.

ARGUMENT

I. The Executive's Claimed Authority Represents An Extraordinary And Potentially Dangerous Departure From The Rule Of Law.

A. Detention Without Charge Or Trial Is An Extraordinary Departure From Traditional Criminal Procedure.

In our system of criminal justice, every citizen and lawful resident is entitled to certain fundamental elements of due process before the government may deprive him of his liberty: arrest only upon a showing of probable cause to believe that a crime has been committed; the right to have any serious criminal charge tried by a jury; and at trial, the right to confront his accusers and not be convicted absent proof beyond a reasonable doubt. *See, e.g., United States v. Marion*, 404 U.S. 307, 320 (1971) ("To legally arrest and detain, the Government must assert probable cause to believe the arrestee has committed a crime."); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) ("The deep commitment of the Nation to the right of jury trial in serious criminal cases as a defense against arbitrary law enforcement qualifies for protection under the Due Process Clause . . . ."); *Pointer v. Texas*, 380 U.S. 400, 404 (1965) ("The fact that th[e] right [of confrontation] appears in the Sixth Amendment . . . reflects the belief of the Framers . . . that confrontation was a fundamental right essential to a fair trial in a criminal prosecution."); *United States*

v. Gaudin, 515 U.S. 506, 510 (1995) ("We have held that [the Fifth and Sixth Amendments] require criminal convictions to rest upon a jury determination that the defendant is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.").

By determining that al-Marri is an "enemy combatant," the Executive traded detention pursuant to our criminal justice system—and all the protections that system affords—for indefinite military detention. From its founding, this Nation has recognized that detention in the absence of legal process is anathema to liberty and inconsistent with the rule of law.

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive. . . . "[I]f once it were left in the power of any, the highest, magistrate to imprison arbitrarily whomever he or his officers thought proper . . . there would soon be an end of all other rights and immunities . . . ."

Hamdi v. Rumsfeld, 542 U.S. 507, 554–55 (2004) (Scalia, J., dissenting) (quoting 1 W. Blackstone, Commentaries on the Laws of England 131–33 (1765)); *see also* The Federalist No. 84 (Alexander Hamilton) ("[T]he practice of arbitrary

imprisonments, [has] been, in all ages, the favorite and most formidable instrument[] of tyranny.").[5]

Accordingly, this Court has held repeatedly that detention outside the traditional criminal process is an extraordinary measure, *see United States v. Salerno*, 481 U.S. 739, 755 (1987) ("In our society liberty is the norm, and detention prior to trial or without trial is the carefully limited exception."), and has permitted its use in only the most limited of circumstances, and then only with the benefit of other procedural safeguards. *See, e.g.*, *Hamdi*, 542 U.S. 507 (confinement of person who engaged in combat against United States during armed conflict abroad); *Salerno*, 481 U.S. 739 (pre-trial detention in criminal proceedings); *Schall v. Martin*, 467 U.S. 253 (1984) (detention of juveniles); *Addington v. Texas*, 441 U.S. 418 (1979) (commitment for mental health reasons); *O'Connor v. Donaldson*, 422 U.S. 563, 582–83 (1975) (Burger,

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[5] Although al-Marri may challenge the basis for his detention in a habeas corpus proceeding, that proceeding would be limited to a determination whether he meets whatever "enemy combatant" standard ultimately is deemed controlling, and would not provide several of the key constitutional safeguards that would be available to him in the criminal justice system. Habeas is not, nor is it intended to be, a substitute for criminal due process. *Rodman v. Pothier*, 264 U.S. 399, 402 (1924) ("[T]his court has uniformly held that the hearing on habeas corpus is not in the nature of a writ of error, nor is it intended as a substitute for the functions of the trial court.") (internal quotation marks omitted); *see also Ex Parte Tom Tong*, 108 U.S. 556, 559 (1883) ("[T]he judicial proceeding under [the writ of habeas corpus] is not to inquire into the criminal act which is complained of, but into the right to liberty notwithstanding the act.").

C.J., concurring) (confinement for quarantine); *Carlson v. Landon*, 342 U.S. 524 (1952) (detention while immigration proceedings pending).

The government's military detention of al-Marri based on allegations of his "associations" and conduct, but without charging him with a crime, represents a dramatic departure from the traditional protections that all citizens and others lawfully resident here properly enjoy.

B. Experience Demonstrates That Legal Regimes That Permit Detention Without Charge Or Trial Are Susceptible To Grave Abuse.

The United States is not the only country that has met organized violence with the assertion of sweeping anti-terrorism powers. Other countries threatened by terrorism, including the United Kingdom (in Northern Ireland), India and Sri Lanka, have adopted regimes granting expansive powers of detention. Notably, in each of those countries, the detention power was expressly legislated, and the procedures for, and limitations on, such detention were set forth by statute. Despite those express limitations, the detention regimes in Northern Ireland, India, and Sri Lanka nevertheless gave rise to frequent and widespread abuses.[6]

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[6] Other jurisdictions as well could be cited to illustrate the same point—that detention without charge or trial is highly prone to abuse and tends to erode the rule of law wherever implemented. Insofar as the circumstances and legal responses of different societies will differ, however, we do not suggest that

Northern Ireland. The practice of indefinite, extra-judicial detention without trial has a well-documented history in twentieth-century Northern Ireland. Some form of internment or detention without trial was authorized by statute from shortly after the 1921 partition of Ireland continuously until 1998. *See* Daniel Moeckli, *The Selective "War on Terror": Executive Detention of Foreign Nationals and the Principle of Non-Discrimination*, 31 Brook. J. Int'l L. 495, 503 (2006).

Immediately after partition, the new Northern Ireland Parliament enacted the Civil Authority (Special Powers) Act (the "Special Powers Act"), which permitted the arrest and indefinite detention of "any person whose behaviour is of such a nature as to give reasonable grounds for suspecting that he has acted or is acting or is about to act in a manner prejudicial to the preservation of the peace or maintenance of order." Civil Authority (Special Powers) Act, 1922, 12 Geo. 5, c. 5, sched., reg. 23.[7] The Special Powers Act provided that any person so arrested could be indefinitely "detained in any of His

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the conditions reported here hold in equal degree across all such examples. We focus on Northern Ireland, India and Sri Lanka because all three are democracies, incorporate recognizable features of the Anglo-American legal tradition, and their responses to terrorist violence have been well-documented.

[7] The Special Powers Act was renewed frequently until 1933, when its provisions became permanent. *See* R. J. Spjut, *Internment and Detention Without Trial in Northern Ireland 1971–1975: Ministerial Policy and Practice*, 49 Mod. L. Rev. 712, 713 (1986).

Majesty's prisons . . . until he has been discharged by direction of the Attorney General or is brought before a court of summary jurisdiction." *Id.*

Internment was permitted under the Special Powers Act until 1972, when it was replaced by a detention regime under the Detention of Terrorists (Northern Ireland) Order (the "DTO"),[8] and then continued under the Northern Ireland (Emergency Provisions) Act (the "EPA")[9] and successor statutes, all of which authorized indefinite detention that was the practical equivalent of internment. *See* Laura K. Donohue, Counter-terrorist Law and Emergency Powers in the United Kingdom 1922–2000, at 132 (2001) ("[The DTO] sought to distinguish between internment and detention . . . . The acceptance of this distinction as being significant was far from widespread."); David R. Lowry, *Internment: Detention Without Trial in Northern Ireland*, 5 Hum. Rights 261, 293 (1976) ("Realizing the public animosity to internment, the [DTO] used the word 'detention' and nowhere mentioned the word 'internment' in an obvious attempt to sanitize the continued use of internment.").

The most notorious use of the internment power in Northern Ireland occurred from 1971 to 1975; in that period, roughly two thousand people were interned without charge (with many more

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[8] Detention of Terrorists (Northern Ireland) Order, 1972, S.I. 1632 (N.I. 15).

[9] Northern Ireland (Emergency Provisions) Act, 1973, c. 53.

arrested for potential internment, then released).[10] The widespread use of the internment power during the early 1970s gave rise to a host of serious abuses.

First, the internment power was used to detain large numbers of innocent people who were not involved in terrorism, in part because internment decisions frequently were made on the basis of incorrect and inadequate intelligence. *See* Report of the Commission to Consider Legal Procedures to Deal with Terrorist Activities in Northern Ireland ¶ 32 (1972) ("[W]hen internment was re-introduced in August 1971, the scale of the operation led to the arrest and detention of a number of persons against whom suspicion was founded on inadequate and inaccurate information."); Lowry, *supra*, at 267 ("[M]any innocent people were arrested and interned because of the lack of rapport with the community."); Spjut, *supra*, at 739 ("Defects in intelligence continued to result in the detention of innocent persons throughout the entire detention programme.").

The internment power in Northern Ireland also was applied discriminatorily. Internees were disproportionately members of the minority Catholic Nationalist community. *See* O'Connor & Rumann, *supra*, at 1678 (stating that of 1,981 persons

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[10] *See* Michael P. O'Connor & Celia M. Rumann, *Into the Fire: How to Avoid Getting Burned by the Same Mistakes Made Fighting Terrorism in Northern Ireland*, 24 Cardozo L. Rev. 1657, 1678 (2003) (stating that 1,981 persons were interned between August 1971 and December 1975); Spjut, *supra*, at App. (showing 2,157 persons interned during same period).

interned between 1971 and 1975, 1,874 were Catholic Nationalists and 107 were Protestant Loyalists); Spjut, *supra*, at 735 ("While Loyalists also perpetrated terrorist crimes H.M. Government used the DTO procedures against them belatedly and sparingly in comparison with its use against Republicans."); *see also* Spjut, *supra*, at 737–38 (discussing institutional biases in use of internment power).

In addition, while detained, internees were frequently subjected to physical abuse and coercive, violent interrogation. *See* Amnesty Int'l, A Report on Allegations of Ill-Treatment Made by Persons Arrested Under the Special Powers Act After 8 August, 1971 (1971), *available at* http://cain.ulst.ac.uk/events/intern/docs/amnesty71.htm (describing allegations including "severe beatings and physical tortures"); Donohue, *supra*, at 118–19 (recounting allegations of widespread ill-treatment of internees, including allegations that security forces "ma[de] them run barefoot over barbed wire and broken glass"); O'Connor & Rumann, *supra*, at 1679 ("The police subjected detainees to interrogation often comprising the use of the 'five techniques,' later branded as 'torture' and 'inhuman and degrading treatment' by the European Commission on Human Rights and Court respectively."); *see also* Lowry, *supra*, at 282 (noting that "many internees and ex-internees successfully prosecuted claims for damages" relating to conditions of detention).

Finally, despite the nominal protections offered by the administrative review procedures under the DTO and the EPA, the limited review

available proved largely illusory and offered internees no meaningful opportunity to challenge their detention. *See* Donohue, *supra*, at 165 ("The respondent's counsel could not cross-examine in great detail any evidence that was given, which was mainly hearsay. Much of it depended on information gained from paid informers who received sums of money and favours from the security forces. The informers themselves, however, did not attend the hearings."); Lowry, *supra*, at 305–06 (asserting that review of hearing process "reveals a slipshod, careless approach on behalf of the Crown and the Commissioners"; quoting lawyers involved as stating that hearings "ranged from 'farcical' or 'absurd' to, at best, 'useless'").

India. India has experienced more significant incidents of terrorism than perhaps any other country. Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 Colum. J. Asian L. 93, 99–100 (2006); *see also* Arunabha Bhoumik, *Democratic Responses to Terrorism: A Comparative Study of the United States, Israel, and India*, 33 Denv. J. Int'l L. & Pol'y 285, 329 (2005) ("With over one hundred thousand casualties, terrorism has taken more lives in India than any other country."). In response, India's Parliament has enacted several major pieces of emergency legislation that utilize lengthy detention before, or in the absence of, charge or trial.[11] Two

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[11] The Indian Constitution, unlike our Constitution, grants the federal and state governments the power to enact detention laws in the interest of national or state security. *See* India

such Acts are the Terrorist and Disruptive Activities (Prevention) Act ("TADA")[12] and the Prevention of Terrorism Act ("POTA").[13] Kalhan et al., *supra*, at 141. Each of these Acts was condemned for the abusive manner in which it was applied, and each has since been repealed.[14]

TADA was enacted in 1985, in response to an extended period of violence in Punjab after the assassination of Prime Minister Indira Gandhi. Kalhan et al., *supra*, at 145. It defined, and permitted the state prosecution of, a number of terrorism-related offenses. *Id.* Until it lapsed in 1995, however, TADA was "predominantly used not

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Const., Sched. 7, List I, Entry 9 (Central Government Powers); *id.* List III, Entry 3 (Concurrent Powers).

[12] Terrorist and Disruptive Activities (Prevention) Act, No. 31 of 1985. Originally expected to expire after two years, the legislature re-enacted TADA in 1987 for another six years. *See* Terrorist and Disruptive Activities (Prevention) Act, No. 28 of 1987; Manas Mohapatra, Comment, *Learning Lessons from India: The Recent History of Antiterrorist Legislation on the Subcontinent*, 95 J. Crim. L. & Criminology 315, 329 (2004).

[13] Prevention of Terrorism Act, No. 15 of 2002.

[14] Following the November 2008 terrorist attacks in Mumbai, India's Parliament swiftly approved new anti-terrorist legislation that, among other things, empowers police to detain suspects for up to 180 days without charge. Rama Lakshmi, *Anti-Terror Bills Advance in India*, Wash. Post, Dec. 18, 2008, at A21. India's President signed the bill into law on December 31, 2008. *Indian President Approves Anti-Terror Law*, CBS News, Jan. 2, 2009, *available at* www.cbsnews.com/stories/2009/01/02/ap/asia/main4695741.shtml.

to prosecute and punish actual terrorists," but "as a tool that enabled pervasive use of preventive detention and a variety of abuses by the police, including extortion and torture." *Id.* at 146–47; *see also id.* at 147 ("TADA's provisions consistently were used in an arbitrary and discriminatory manner to target political opponents, religious minorities . . . and other lower caste groups . . . ."); Mohapatra, *supra*, at 331 ("[T]he actual result of [TADA] was widespread abuse as its broad definition of terrorism was used to crack down on political dissidents . . . and was used in some regions exclusively against religious and ethnic minorities."). Between 1987 and 1995, TADA was used to "put 77,000 people in prison," of which only 8,000 eventually were tried for terrorist activities and only two percent ultimately were convicted. *See* Amnesty Int'l, India: Report of the Malimath Committee on Reforms of the Criminal Justice System: Some Observations 22 (Sept. 19, 2003) (referring to the conviction rate under TADA as "abysmally low").

Like TADA, POTA was enacted in response to specific incidents of terrorism—in this instance, the attacks on the legislative assembly of Jammu & Kashmir in October 2001 and on the Indian Parliament building in December 2001. Kalhan et al., *supra*, at 152. Abuses committed under the authority of POTA began almost immediately after the statute's enactment in March 2002 and continued unabated thereafter; on one day in February 2003, POTA was used to detain over 330 people in two different states—200 for allegedly supporting Communism and 130 Muslims for allegedly attacking Hindus. Human Rights Watch,

In the Name of Counter-Terrorism: Human Rights Abuses Worldwide 16 (Mar. 25, 2003) (hereinafter Human Rights Watch Report). "[H]undreds of questionable and prolonged detentions with no formal charges filed" have been attributed to POTA. Chris Gagne, *POTA: Lessons Learned from India's Anti-Terror Act*, 25 B.C. Third World L.J. 261, 264 (2005). Furthermore, like TADA, "[a]dministration of POTA . . . varied widely across the country, resulting in arbitrary and selective enforcement against members of . . . minority communities . . . and police misconduct and abuse, including torture." Kalhan et al., *supra*, at 173; *see also* Human Rights Watch Report, *supra*, at 15 (documenting numerous incidents of POTA's use against political opponents and racial, ethnic, and religious minorities). In response to complaints of abuse, Parliament repealed POTA in 2004.[15] Mohapatra, *supra*, at 335.

Sri Lanka. Prolonged detention without charge in Sri Lanka is authorized by a set of Emergency Regulations, enacted pursuant to the Public Security Ordinance of 1947 ("PSO"),[16] and the Prevention of Terrorism (Temporary Provisions) Act of 1979 ("PTA").[17] Section 5 of the PSO, part II, permits the President to proclaim a state of emergency "in the interest of public security and the

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[15] Even after POTA's repeal, the law continued to apply in limited circumstances. Kalhan et al., *supra*, at 153.

[16] Public Security Ordinance, No. 25 of 1947.

[17] Prevention of Terrorism (Temporary Provisions) Act, No. 48 of 1979.

preservation of public order." Deepika Udagama, *Taming of the Beast: Judicial Responses to State Violence in Sri Lanka*, 11 Harv. Hum. Rts. J. 269, 277 (1998); *see also* Radhika Coomaraswamy et al., *Rule by Emergency: Sri Lanka's Postcolonial Constitutional Experience*, 2 Int'l J. Const. L. 272, 276 (2004). Violent clashes among the Sri Lankan government, the Janatha Vimukthi Peramuna, a Marxist political party, and the Liberation Tigers of Tamil Eelam ("LTTE"), an extremist Tamil nationalist organization, have subjected Sri Lanka to more years of emergency rule than of democratic governance. Coomaraswamy et al., *supra*, at 274–76; Udagama, *supra*, at 272–74.

In times of emergency, the President "usually enacts a set of regulations entitled the Emergency (Miscellaneous Provisions and Powers) Regulations (EMPRR)." Coomaraswamy et al., *supra*, at 278. The regulations typically authorize the Defense Secretary to order a suspect's detention "in order 'to prevent a person from engaging in acts inimical to national security . . . .'" Udagama, *supra*, at 279 (quoting EMPRR No. 17, Gazette No. 563/7 (June 20, 1989)).[18] Pursuant to a 2008 amendment, a suspect may be detained for eighteen months before he must be produced before the courts. Human Rights Watch, World Report 2009 – Sri Lanka (Jan. 14, 2009) (hereinafter Sri Lanka 2009 World Report). The Defense Secretary need only be "of [the] opinion"

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[18] *See also* EMPRR No. 19, Gazette No. 1405/14 (Aug. 13, 2005) (authorizing the Defense Secretary to detain a suspect "to prevent[] such person from acting in any manner prejudicial to the national security or to the maintenance of public order").

that detention is necessary. EMPPR No. 19, Gazette No. 1405/14. The most recent incarnation of the regulations was enacted in August 2005, following the assassination of a Sri Lanka foreign minister (after a brief respite during the 2002 ceasefire between the government and LTTE), and remains in effect today. Amnesty Int'l, Sri Lanka: Silencing Dissent 9 (Feb. 7, 2008).

The PTA was enacted in 1979 as a temporary measure "to eliminate threats to a unified Sri Lanka," and became a permanent measure in 1982. Coomaraswamy et al., *supra*, at 275–76. Section 9 of the PTA permits a minister to order the detention of a suspect for up to eighteen months without judicial oversight if he "has reason to believe or suspect" that the detainee is involved in unlawful activity. Udagama, *supra*, at 276. An order under § 9 is "final and conclusive and cannot be questioned in any court or tribunal." *Id.*

Together, the emergency regulations and PTA have resulted in widespread incidents of "arbitrary arrests and incommunicado detentions." Udagama, *supra*, at 279. "From January to November 2000 alone, approximately 18,000 people were arrested under emergency regulations or the [PTA]" and were detained for over two years without trial. Coomaraswamy et al., *supra*, at 284. Detention has been associated with disappearances, torture, and extra-judicial killings. *Id.* at 291; *see also* N. Monaharan, East-West Center, Counterterrorism in Sri Lanka: Evaluating Efficacy 33 (2006) (stating that the broad discretion afforded security forces under the regulations has normalized disappearances); Amnesty Int'l, Sri Lanka, New

Emergency Regulations – Erosion of Human Rights Protections (July 1, 2000) (noting that, following amendment of the detention regulation in 2000, reports of torture increased, and the methods of reported torture became more severe).[19] Evidence further shows that these laws are applied disproportionately against minorities and political opponents of the government: for example, although Tamils are only 16% of the overall population, in 2007, the "overwhelming majority" of the victims of human rights violations such as arbitrary arrest and detention, killings, disappearances and torture "were young male Tamils." U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2007 (Mar. 11, 2008); *see also* Sri Lanka 2009 World Report, *supra* (stating that the government "uses the [emergency] regulations to arrest and detain political opponents . . . and members of the Tamil minority community"); Udagama, *supra*, at 277 (discussing the PTA's use against Tamils and the government's political opponents).

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[19] Although Amnesty International was careful to note there is no "conclusive evidence" linking the amendment of the regulations with the increased reports of torture, it also noted that "[o]ne of the most basic safeguards against torture and 'disappearance' is to ensure that no prisoners are held for long periods of time in the custody of those responsible for their interrogation and that they have access to their relatives, lawyer and a doctor." *Id.*

II. The Authority To Detain Claimed By The Executive Has Not Been Effective In Combating Terrorism And May Instead Be Counterproductive.

A. Foreign Legal Regimes That Permit Detention Without Charge Or Trial Have Not Enhanced Security.

As the experiences of Northern Ireland, India and Sri Lanka demonstrate, legal regimes that permit lengthy detention without charge or trial are susceptible to serious abuses. If such measures were proven effective in reducing terrorism, it might be questioned whether the societal costs (in terms of the erosion of due process protections) were at least mitigated by the benefits of living in more secure and less violent societies. There is little or no evidence, however, that regimes permitting prolonged or indefinite detentions without charge or trial actually are effective in preventing terrorism. On the contrary, these regimes may even *contribute* to greater violence.

Northern Ireland. The use of the internment power in Northern Ireland proved ineffective in its ostensible aim of reducing terrorism and political violence in several ways.

Evidence indicates that the use of internment actually *strengthened* terrorist organizations by bolstering support for the Irish Republican Army ("IRA") among Catholics and aiding the IRA in its efforts to recruit new members. *See* O'Connor & Rumann, *supra*, at 1680 ("[T]he brutal internment of family members was frequently identified as critical to the decision to join outlawed paramilitary

organizations."); Lowry, *supra*, at 267 ("[T]he hostility engendered by counter-terror tactics made the Catholic ghettos a safe haven for the Provisional I.R.A."); Philip A. Thomas, *September 11th and Good Governance*, 53 N. Ir. Legal Q. 366, 385 (2002) (quoting British MP during Parliamentary debate on 1998 bill revoking internment power: "Frankly it has not worked . . . we believe that the use of internment would strengthen the terrorists."). In addition, many internees emerged from the experience more "politicized and radicalized" than before their detention. Lowry, *supra*, at 276; Donohue, *supra*, at 166 ("[T]hose held in prisons became increasingly sympathetic to anti-government paramilitary activity.").

Equally significant, internment also led to a marked decline in the legal system's legitimacy: "Because the judicial process and the protections it provides were unavailable to internees, who were overwhelmingly chosen from the minority community, the judicial process itself became tainted and compromised." O'Connor and Rumann, *supra*, at 1680–81; Donohue, *supra*, at 166 (stating that conduct of internment policy "placed the system in disrepute," and noting that "[e]ven loyalists" were "appalled" by the detention system).[20] This distrust,

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[20] Reviewing the use of emergency legislation during the internment period, Lord Gardiner observed that the administrative review process was "not perceived as being just by members of the general public." Report of a Committee to Consider, in the Context of Civil Liberties and Human Rights, Measures to Deal with Terrorism in Northern Ireland ¶ 145 (1975).

in turn, rendered longstanding sectarian disputes in Northern Ireland more resistant to political negotiation and compromise. Lowry, *supra*, at 323 ("It would be an understatement to say that internment has produced a degree of alienation in the minority community which could make an agreed political solution at best unworkable . . . .").

Moreover, it is now widely recognized that the internment power not only failed to reduce or prevent violence, but likely exacerbated political violence in Northern Ireland. Almost immediately after internment was reintroduced in August 1971, incidents of terrorism rose dramatically. *See* Thomas, *supra*, at 385 ("Internment was introduced in 1971 when 27 people were killed in the first eight months of that year. In the following four months, after bringing in that power, 147 people were killed."); Spjut, *supra*, at 716 ("[T]he number of explosions increased from 79 in July [1971] to 142, 186, 155, 117 and 123 in August to December."). Terrorist violence reached historic levels in 1972, and the annual death toll in Northern Ireland remained elevated through the entire period of internment, subsiding only in 1977, after internment was discontinued. *See* Brendan O'Duffy & Brendan O'Leary, *Violence in Northern Ireland, 1969-June 1989*, *in* The Future of Northern Ireland, App. 3 (John McGarry & Brendan O'Leary eds., 1990).

India and Sri Lanka. Both the Indian and Sri Lankan experiences illustrate the cycle of futility that can be set in motion when countries even more beset by terrorism than is the United States respond by implementing detention regimes that are prone to overly broad, discriminatory and harsh application.

In India, this cycle has played out in a series of terrorist incidents, followed by stringent legislation that spawns abuse, repeal in the face of popular outrage and then, ultimately, re-enactment—all without abating violence. *See* Kalhan et al., *supra*, at 105–06 (describing the pattern). India's Parliament originally passed TADA in response to a particularly violent period during the early 1980s. *Id.* at 145. When TADA failed to reduce terrorist activity, Indian lawmakers amended and strengthened the law. Mohapatra, *supra*, at 330. In light of its rampant abuse, TADA was permitted to lapse in 1995, but was followed by the newer, even more stringent, POTA in 2001 after terrorist attacks on India's Parliament. *Id.* at 333. Again, in the face of criticism, POTA was repealed in 2004, only for many of its policies to be resurrected in the form of revisions to the Unlawful Activities (Prevention) Act ("UAPA")[21] after the 2008 bombing in Mumbai.

Today, the same debate surrounding earlier anti-terrorist legislation is being repeated with respect to the UAPA: one lawmaker has argued that the perpetrators of the Mumbai attacks "forced" the government to respond with strong anti-terror laws, and that the passage of the UAPA was proof that "objections to POTA were spurious and measures taken by the government still are not strong enough." Nagendar Sharma, *Won't Allow Misuse of Terror Law: PC*, Hindustan Times, Dec. 19, 2008. Human rights organizations and other Indian

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[21] Unlawful Activities (Prevention) Amendment Act, No. 35 of 2008.

leaders, on the other hand, have expressed concern that the new law's powers of detention vest overbroad authority in the government. *See, e.g.*, Lakshmi, *supra* (quoting Indian lawmaker discussing UAPA that "[d]emocracy must not be impaired while fighting terrorism"); Amnesty Int'l, India: New Anti-Terror Laws Would Violate International Human Rights Standards (Dec. 18, 2008) (calling for India's president to reject the new law, citing its potential to violate human rights).

Similarly, although Sri Lanka has been under emergency rule almost continuously since its independence in 1947, and its anti-terrorism law (the PTA) has been in place since 1979, there has been no discernible or lasting decrease in violence. Rather than preventing violence, the combination of emergency rule and the PTA has "achieved the counterproductive result of fueling the increasingly violent Tamil movement for an independent state." Coomaraswamy et al., *supra*, at 276; *see also* Amita Shastri, *Government Policy and the Ethnic Crisis in Sri Lanka*, *in* Government Policies and Ethnic Relations in Asia and the Pacific 129, 153 (Michael E. Brown & Sumit Ganguly eds., 1997). During the 1980s and 1990s, "[t]he government relied heavily on its emergency powers to harass and detain Tamil insurgents. This, of course, led to even more Tamil hostility." Shastri, *supra*, at 153. Escalating Tamil hostility predictably prompted harsher laws. Coomaraswamy et al., *supra*, at 276 (noting that advances by the LTTE "corresponded" with "the severity of emergency rule"). This cycle of violence followed by repressive legislation was repeated following the assassination of a Sri Lankan foreign

minister and the reinstatement of emergency rule in 2005—which led to a host of human rights violations, including arbitrary arrest and detention torture, disappearances, and unlawful killings. *See, e.g.*, U.S. Dep't of State, Sri Lanka: Country Reports on Human Rights Practices 2005 (Mar. 8, 2006).

B. Domestic Experience Further Highlights The Risks And Inefficacy Of Detention Without Charge Or Trial

Al-Marri's indefinite military detention is premised on the Executive's determination that he is an "enemy combatant" within the meaning of the AUMF. If the government's construction of its authority under the AUMF is upheld, the Executive will be able to detain *anyone*, possibly for life, based on the detainee's claimed association with the "enemy" and the asserted risk to the United States that his freedom poses, without any corresponding requirement to prove criminal wrongdoing in the way that our system normally requires. And while al-Marri is as yet the only such detainee, once the government is granted this power to detain without formal charge or trial, its exercise undoubtedly will prove irresistible in terrorism-related cases where the evidence is weak, or prosecution problematic, or some other inconvenience stands in the government's way. *Cf. Korematsu v. United States*, 323 U.S. 214, 246 (1944) (Jackson, J., dissenting) ("The principle . . . lies about like a loaded weapon, ready for the hand of any authority that can bring forward a plausible claim of an urgent need.").

As our own history indicates, detentions outside of ordinary criminal processes readily lend themselves to being applied in an arbitrary and discriminatory manner, with dire consequences for the affected communities and without advancing the ultimate goal of preventing terrorism. The most recent episode followed the attacks of September 11, and therefore would not have been considered by the Congress that enacted the AUMF. The earlier one, involving the detention of persons of Japanese ancestry during World War II, however, has left a deep scar on our Nation's history, one that renders unimaginable the suggestion that Congress would have authorized a broad new domestic detention power without considering its potential implications.

Following the events of September 11, 2001, the United States undertook a large-scale detention campaign targeted at immigrants, particularly Muslims, South Asians and Arabs. *See* Office of Inspector General, Dep't of Justice, The September 11th Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of September 11 Attacks 14, 20–23 (April 2003) (hereinafter OIG Report) (identifying detainees as almost exclusively men, aged 26 to 40, predominantly from Pakistan, Egypt, Iran, and Afghanistan). "Within 2 months of the attacks, law enforcement authorities had detained . . . more than 1,200 citizens and aliens nationwide"; some were released after questioning, but some were subjected to "a pattern of physical and verbal abuse," that included "racial slurs and threats" and aggressive mistreatment at the hands of detention officers. *Id.* at 1, 142–44.

The detention of Muslims, Arabs, and South Asians after September 11 has been condemned as both arbitrary and discriminatory. In a study of the immigration detentions that took place in New York immediately following September 11, the OIG determined that in carrying out the detentions, the FBI and INS had made "little effort" to distinguish between detainees who were tied to terrorism and those who had been encountered by chance, and that the procedures used to determine which persons were of "high interest" were inconsistent and imprecise. *Id.* at 69. The OIG found also that Muslims were detained irrespective of any link to terrorism. *Id.* at 158. Indeed, "[g]overnment officials now acknowledge that virtually all of the persons that it detained shortly after 9/11 had no connection to terrorism." *See* Justice for All – A Nationwide Public Forum on Selective Enforcement After September 11, 2001 Before Sens. Edward M. Kennedy and Patty Murray (June 4, 2003) (written testimony of American Civil Liberties Union).

The ineffectiveness of that detention campaign in identifying terrorists is not surprising. As noted by Clark Kent Ervin, former Inspector General of the Homeland Security Department, it "is illogical" to be more suspicious of Arabs, "because the chance that any given Arab is a terrorist is only marginally greater than the chance that anybody else is a terrorist." Clark Kent Ervin, *The Usual Suspects*, N.Y. Times, June 27, 2006, at A1. Basing detention decisions on a racial or ethnic profile also wastes valuable resources and encourages lazy

policing.[22] Overwhelmed by the large number of suspects captured within its broad net, law enforcement will expend valuable time and resources questioning and detaining innocent persons.[23]

Furthermore, focusing suspicion on those who fit a particular profile may cause law enforcement to overlook truly dangerous persons. Terrorist organizations have many allies who may not fit the government's apparent profile. *See, e.g.*, Ervin, *supra* (citing 2004 conviction of Earnest James Ojaama, "a Seattle-born black convert to radical Islam" alleged to have provided material to the Taliban, and John Walker Lindh, the "white 'American Taliban'"); *see also* Bill Dedham, *Memo*

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[22] *See e.g., Peter DiDomenica Discusses Counterterrorism Measures*, Nat'l Pub. Radio, July 30, 2005 (quoting Massachusetts police sergeant and airport screening trainer that "We do not target people based on apparent race or ethnicity. We feel that use of race . . . [is] counterproductive, . . . wastes valuable resources and it also causes ill will with the particular community that is a victim . . . ."); Am. Civil Liberties Union, Sanctioned Bias: Racial Profiling Since 9/11 8 (Feb. 2004) (quoting Texas law enforcement officer that racial profiling "is a lazy method for law enforcement. You're not using investigative leads . . . all you're doing is casting a wide net against one . . . segment of society, and that's what we call 'going fishing' . . . .").

[23] *See* David A. Harris, *New Risks, New Tactics: An Assessment of the Re-Assessment of Racial Profiling in the Wake of September 11, 2001*, 2004 Utah L. Rev. 913, 928 (2004) ("Adding large numbers of people to the suspect pool who are overwhelmingly unlikely to have anything to do with terrorism will not improve our chances to find the bad guys; on the contrary, it will overwhelm the system with people who present no real risk . . . .").

Warns Against Use of Profiling as Defense, Boston Globe, Oct. 12, 2001, at A27 (discussing memo circulated by senior U.S. intelligence specialists to American law enforcement agents worldwide, which warned against relying on an individual's characteristics, rather than behavior, in assessing potential threats).[24]

Of course, the most extreme example of detention outside of the criminal process in the United States was the internment of more than 120,000 persons of Japanese ancestry on the West Coast during World War II. *See* Comm'n On Wartime Relocation And Internment Of Civilians, Report: Personal Justice Denied, Summary (1983). The government justified the exclusion by asserting that there were "indications that [Japanese-Americans] were organized and ready for concerted action at a favorable opportunity. The very fact that no sabotage has taken place to date is a disturbing and confirming indication that such action will be taken." *Id.* (quoting General John L. DeWitt, Commanding General of Western Defense Command). In the end, "not a single documented act of espionage, sabotage or fifth column activity was committed by an American citizen of Japanese

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[24] *See also* Fed. Bureau of Investigation, Countering Terrorism: Integration of Practice and Theory 27 (Feb. 28, 2002) (warning that "[t]here is some risk in the manner in which people from Muslim- and Arab- communities appear to have been targeted for intensive and continued scrutiny" post September 11, because "most people with [the profile] characteristics are not terrorists" and "there is a real danger of ignoring other people who do not have these characteristics [but] may actively support or participate in terrorist acts").

ancestry or by a resident Japanese on the West Coast." *Id.*

The legal foundation for the Japanese internment was Executive Order 9066, a sweeping pronouncement by the President, later "ratified" by Congress, that was interpreted to permit the military to impose curfews, exclusion, internment and relocation on persons of Japanese descent. Exec. Order No. 9066, 7 Fed. Reg. 1407 (Feb. 19, 1942); *see also Hirabayashi v. United States*, 320 U.S. 81, 91, 104–05 (1943) (stating that Executive Order 9066 was "ratified and confirmed" by March 21, 1942 Act of Congress, 56 Stat. 173; rejecting challenge to curfew order issued pursuant to Executive Order 9066).

The Japanese internment has now been universally repudiated, *see, e.g., Stenberg v. Carhart*, 530 U.S. 914, 953 (2000) (Scalia, J., dissenting); *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 236 (1995), and the United States has formally apologized and granted reparations to the survivors. In 1971, as part of the bill repealing the Emergency Detention Act of 1950, Congress enacted 18 U.S.C. § 4001(a), which states that "[n]o person shall be imprisoned or otherwise detained by the United States except pursuant to an Act of Congress." *See Hamdi*, 542 U.S. at 517. In passing § 4001(a), "Congress was particularly concerned about the possibility that the [Emergency Detention] Act could

be used to reprise the Japanese-American internment camps of World War II." *Id.*[25]

Given our Nation's shameful past experience with the standard-less grant of broad detention powers outside the criminal process, and in light of § 4001(a), it simply is not reasonable to conclude that Congress would reauthorize indefinite domestic detention without trial *sub silentio* through the AUMF, which nowhere mentions the power to detain persons lawfully resident in this country.

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[25] The House Judiciary Committee Report accompanying the bill is strikingly relevant to the Executive's claimed authority in this case:

> [T]he constitutional validity of the [Emergency Detention] Act is subject to grave challenge. The Act permits detention of each person as to whom there is a reasonable ground to believe that such person probably will engage in, or probably will conspire with other to engage in, acts of espionage or of sabotage. This criterion would seem to violate the Fifth Amendment by providing imprisonment not as a penalty for the commission of an offense, but on mere suspicion that an offense may occur in the future.

H.R. Rep. No. 92-116 (1971), *reprinted in* 1971 U.S.C.C.A.N. 1435, 1438.

C. Sacrificing The Rule Of Law Alienates Domestic Communities And International Allies Whose Help Is Needed.

Detention without charge or trial not only is ineffective in actually identifying terrorists and preventing terrorism; the departure from the rule of law that it signals may actually undermine law enforcement's efforts in this vital area.

The government's ability to instill trust in, and foster relationships with, key communities is vital to its public safety mission. *See, e.g.*, Police Executive Research Forum, 2 Protecting Your Community From Terrorism: Strategies for Local Law Enforcement: Working with Diverse Communities 26 (2004) ("Diverse communities . . . may well be willing to work with investigators who they believe will respect their privacy, their traditions and act responsibly to keep terrorists out of their communities."); Nicole J. Henderson et al., Vera Inst. Of Justice, Law Enforcement & Arab Community Relations After September 11, 2001: Engagement in a Time of Uncertainty 17 (2006) (quoting one police chief as recognizing that "[T]he collection of intelligence will come from the community. So a relation of trust and confidence with the [Arab American] community is important . . . . We can't afford to alienate them. Otherwise, we cut off our sources of information."); *Threat of Islamic Radicalization to the Homeland: Hearing Before the S. Comm. On Homeland Security and Governmental Affairs*, 110th Cong. 3 (March 14, 2007) (written testimony of Daniel Sutherland,

Officer for Civil Rights and Civil Liberties, U.S. Department of Homeland Security) (hereinafter Sutherland Testimony) ("We believe that a critical element of our strategy for securing this country is to build a level of communication, trust, and confidence . . . .").

The arrest and indefinite detention of persons outside of the ordinary criminal process, particularly when perceived to be based on the ethnic or religious orientation of the detained, will hinder terrorism prevention efforts because it "sends a message that law enforcement has targeted a whole community as 'alien' or 'suspect.'" David Cole, *Enemy Aliens*, 54 Stan. L. Rev. 953, 986 (2002). Sending that message "cannot help but alienate members of the targeted community, rendering them far less likely to assist law enforcement in their efforts to identify true perpetrators." *Id.*; *see also* Kalhan et al., *supra*, at 101–02 ("Alienated communities are also less likely to cooperate with law enforcement, depriving the police of information and resources that can be used to combat terrorism."). The consequences can be serious, considering that these communities could be particularly helpful to law enforcement in its terrorism-prevention work.

This erosion in the trust and confidence of immigrant communities was precisely what the widespread detention of Muslim, Arab and South Asian citizens, aliens and immigrants achieved in the aftermath of September 11. "[T]he nationality-based information and detention sweeps of the past two years have taken a serious toll on immigrant communities in the United States. Arab and Muslim organizations describe the 'chilling effect' that these

programs have had on community relations . . . . [T]hese blanket immigration measures have alienated the very communities whose intelligence and cooperation is needed most." Lawyers Comm. For Human Rights, Assessing the New Normal, Liberty and Security for the Post-September 11 United States 31 (2003) (hereinafter Lawyers Comm. Report). Similarly, Vincent Cannistraro, former Director of Intelligence Programs for the National Security Council under former President Reagan, has written that "the Justice Department's detention of thousands of immigrant Muslims—the policy of 'shaking the trees' in Islamic communities—alienates the very people on whom law enforcement depends for leads and may turn out to be counterproductive." Vincent Cannistraro, *The War on Terror Enters Phase 2*, N.Y. Times, May 2, 2002, at A1; *see also* Harris, *supra*, at 933–34 (noting that the investigation of now-convicted terrorist suspects began based on tips contained in a community member's letter to the FBI).[26]

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[26] Recognizing that post-9/11 treatment of Arabs and Muslims in the United States caused substantial damage to relationships between those communities and law enforcement, federal and local authorities have made significant recent efforts to rebuild those relationships. *See, e.g.*, Sutherland Testimony at 3–5; *see also* Deborah Ramirez & Stephanie Woldenberg, *Balancing Security and Liberty in a Post-September 11th World: The Search for Common Sense in Domestic Counterterrorism Policy*, 14 Temp. Pol. & Civ. Rts. L. Rev. 495, 504–06 (2005) (describing successes of partnerships between Muslim communities and federal, state and local law enforcement). Similarly, the British government recently has instituted a counterterrorism strategy called "Prevent," a major component of which is to develop greater engagement with

As has occurred elsewhere, moreover, harsh and overbroad detention policies in particular, and a perceived abandonment of the rule of law in general, are likely to aid extremists by facilitating recruitment of the disaffected. *See* Hearing before S. Select Comm. on Intelligence, 111th Cong. 7 (Jan. 22, 2009) (statement of Dennis C. Blair, nominee for Director of National Intelligence) ("[T]he detention center at Guantanamo has become a damaging symbol to the world and . . . it must be closed. It is a rallying cry for terrorist recruitment and harmful to our national security . . . ."). As the former Inspector General of the Homeland Security Department has observed, "Al Qaeda regards American prisons . . . as particularly fertile territory for planting and harvesting the seeds of terrorism." Ervin, *supra*. The recruitment danger has been recognized abroad as well. *See, e.g.*, Sharma, *supra* (during the debates surrounding India's new anti-terror law, one lawmaker warned against making the law too harsh, stating, "[u]nnecessary harassment only provides fertile ground for breeding terrorists").[27]

Britain's Muslim communities. *See* Brendan O'Duffy, *Radical Atmosphere: Explaining Jihadist Radicalization in the UK*, 41 Pol. Sci. & Politics 137, 142 (2008).

[27] The courts of this and other countries, too, recognize that due process and respect for law are important ingredients in the fight against terror and violence. *See People's Union for Civil Liberties v. Union of India*, AIR 2004 SC 456, 467 ("[T]errorism thrives where human rights are violated."); *cf. Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[F]ear breeds repression; . . . repression breeds hate; [and] . . . hate menaces stable government").

Detention practices that depart from the conventional criminal process also threaten the United States' standing in the international community,[28] thus undermining the United States' ability to secure counterterrorism cooperation from other countries. *See* Deborah N. Pearlstein, *National Intelligence and the Rule of Law*, 2 Advance 11, 16 (Fall 2008) ("[W]idely reported U.S. practices of kidnapping and secretly imprisoning and torturing terrorist suspects led the British to withdraw from previously planned covert operations with the CIA because the United States failed to offer adequate assurances against inhumane treatment and rendition."). Legitimacy at the international level is essential, as "terrorism is a transnational phenomenon and . . . demands a transnational response." Cole, *supra*, at 958. The United States needs the cooperation and assistance of other nations' law enforcement and intelligence networks to fight terrorism effectively. *Id.*; *see also* Cannistraro, *supra* (describing the arrest by Spanish

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[28] Or place the United States in unwelcome company: some countries whose legal systems are less protective of individual liberties than ours conveniently cite to the United States' post-September 11 actions as justification for their own practices. Egypt's President Hosni Mubarak has stated that the steps the United States took following September 11 demonstrated that "we were right from the beginning in using all means . . . to combat terrorism." Lawyers Comm. Report, *supra*, at v. Eritrea's Ambassador to the United States justified the two-year incommunicado detention without charge of ten journalists who had written articles critical of that government by analogizing to "America's roundup of material witnesses and suspected aliens" following September 11. *Id.* at 78.

police of Mohammad Galeb Kalaje Zouaydi, who helped fund the September 11 attacks, and 23 other Al Qaeda suspects, and the apprehension by Dutch, French, Italian, and German forces of al Qaeda members; concluding "[i]n all, some 1,600 Qaeda suspects have been arrested in over 30 countries").

In short, it is not the extraordinary power to depart from established due process norms that will foster the cooperation from communities and allies on which effective counter-terrorism measures depend, but rather the faithful observance of those norms and processes.

CONCLUSION

In his Inaugural Address last week, the President said: "As for our common defense, we reject as false the choice between our safety and our ideals." *Amici* urge this Court, too, to reject that false choice. Insofar as the Fourth Circuit Court of Appeals' decision construed the AUMF to authorize the Executive to detain indefinitely a person lawfully residing in this country by labeling him an "enemy combatant," the decision should be reversed.

Respectfully submitted,

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